STATE OF MICHIGAN

COURT OF APPEALS

JARED M SCHUBINER and
SONDRA SCHUBINER,

Plaintiffs-Appellants,

v

SOMMERS SCHWARTZ SILVER &
SCHWARTZ, P.C., and
ANDREW KOCHANOWSKI,

Defendants-Appellees.

UNPUBLISHED
June 26, 2007

No. 274775
Oakland Circuit Court
LC No. 02-046148-NM

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition to defendants in this legal malpractice action. We affirm.

This matter arises from an arbitration in which defendants represented plaintiffs. In that action, plaintiffs sought commissions on the sale of securities; the arbitration panel awarded plaintiffs substantially less than they believe they are entitled to, and plaintiffs assert this was due to errors committed by their attorney.

Plaintiff Sondra Schubiner ("Sondra") and plaintiff Jared ("Bud" or "Buddy") Schubiner were, by contract, authorized representatives for the sale of securities for Chubb Securities Corporation ("Chubb")[1]. Thomas Maxey ("Maxey") is Chubb's District Manager in Michigan, and is the President of Consolidated Financial Services ("CFC").

In July 1995, Buddy contacted Chris Doebler, the Assistant Managing Director of the Michigan Tooling Association ("MTA") in an effort to solicit MTA's 401(k) business. Plaintiffs assert in their brief on appeal that they both worked to solicit this business from August through October 1995. In a deposition given in April 1998, Buddy explained the steps taken to solicit the

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[1] At some point after both plaintiffs were involved with Chubb, Jefferson Pilot Securities Corporation ("Jefferson") acquired the assets of Chubb and assumed all of Chubb's contracts.

business. Buddy scheduled an appointment with Doebler to discuss MTA's 401(k) business, and Maxey attended the meeting at Buddy's request. Richard Steinhelper, Administrator of MTA's Benefit Plans Investment Trust, attended the meeting also. The same four participants met again four or five more times before the October 23, 1995, meeting at which MTA approved the transfer of its 401(k) plan from its prior provider to CFC. Sondra did not attend any of these meetings. Buddy explained that he did preparatory work for each meeting so that he and Maxey could show the MTA representatives how they could "solve the problems" MTA had with its then- current provider, MetLife. In addition, after MTA had signed with CFC, both Buddy and Sondra attended many meetings with the member companies of MTA (according to Sondra's deposition testimony, MTA's membership included about 100 companies) and gave presentations on the mutual funds and 401(k) plan offered through Jefferson.

On August 15, 1996, Steinhelper sent a letter to Maxey "acknowledging CFC's appointment of Tom Maxey as our registered principle [sic] and registered representative acting on behalf of the MTA." On October 18, 1996, in a letter to Maxey, Steinhelper directed that Buddy be terminated from the MTA account. Between March 1996 and March 1997, Maxey and CFC paid commissions to the Schubiners for the MTA sales. Beginning in April 1997, Maxey stopped paying commissions to the Schubiners.

The Schubiners filed suit against Maxey and CFC, alleging breach of contract, fraud, and tortious interference with business relations. Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). The trial court found that genuine issues of material fact existed as to all counts, but noted that some claims were "weak," and encouraged defendants to re-file their motion at the close of discovery.

In March 1998, the Schubiners retained Andrew Kochanowski, an attorney with Sommers, Schwartz, to replace their prior counsel. On March 25, 1998, after successfully arguing a motion for leave to amend the complaint, Kochanowski added Chubb/Jefferson as a defendant.[2] Jefferson moved to dismiss the complaint and to compel arbitration, pursuant to the NASD Form U-4[3] the Uniform Application for Securities Industry Registration or Transfer.[4] CFC and Maxey joined in Jefferson's motion. The trial court granted the motion, ordering the matter to be dismissed and resolved by arbitration.

Kochanowski filed a Statement of Claim on behalf of the Schubiners, naming Maxey, CFC, and Jefferson as respondents in an arbitration proceeding, and claiming damages of $3.4 million. The arbitration panel granted Jefferson's motion to dismiss. With CFC and Maxey

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[2] Kochanowski stated in his deposition that he and Buddy discussed adding Jefferson/Chubb as a defendant: "it made sense to me that Chubb should be a party to this case. Whether or not I came up with that notion or Buddy came up with that notion and asked me why they weren't, I don't have a clear recollection. I have some recollection of that being discussed literally from the moment Buddy mentioned the case to me."

[3] Both plaintiffs signed this form as part of their sales representative agreements with Chubb.

[4] See http://www.nasd.com/RegulatorySystems/CRD/FilingGuidance/NASDW_005235

remaining as respondents, the panel conducted an eight-day hearing, and then issued an award granting $93,364 plus ten percent interest from October 31, 1996 to Buddy, and denying Sondra's claims. Maxey or CFC paid $137,852.02 to Buddy. Buddy alleged that after paying attorney fees and expenses, he received only about $14,500.[5]

The Schubiners filed a complaint against Kochanowski and Sommers, Schwartz, alleging legal malpractice.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(8) and (10).[6] The hearing on the motion focused on plaintiffs' claim that Kochanowski should have called a witness who would have testified that the Schubiners had a continuing right to commissions on the MTA business even after Buddy was terminated from the account, pursuant to industry standard practices. Defendants in the underlying case called an expert witness, Paul Litteau, who testified that it was not industry standard to continue receiving commissions after being terminated from an account; plaintiffs' counsel in the underlying case (now defendants in this matter) did not call a witness to rebut that testimony.

Plaintiffs first argued that Kochanowski should have called Peter Cucinella, an expert witness as to NASD practices. Defense counsel responded that Cucinella had stated in his deposition that he could not remember what he might or might not have testified to, had he been called as a witness in the arbitration proceeding. The trial court asked plaintiffs' counsel, "do you want me to guess that he would have said something contrary then?"

Plaintiffs next argued that they had provided Kochanowski with names of other potential witnesses, specifically including Mike Brooks, who could have testified as to industry standard practices, and that Kochanowski had failed to contact these potential witnesses. Defense counsel replied, "my question is, where is there an affidavit or a deposition of Mike Brooks who says it was industry standard to continue to pay someone commissions even after they're fired by the client? It's not in this record. It doesn't exist." The trial court again asked plaintiffs' counsel, "So I'm supposed to guess that he'd say that?" When asked by the trial court whether he had an affidavit from Brooks, plaintiffs' counsel answered, "we have an affidavit from Mr. Schubiner, which attaches a letter that he sent to Mr. Kochanowski telling Mr. Kochanowski what Mr. Brooks would testify to." The trial court also noted that plaintiffs could have had these potential witnesses state in affidavits or depositions what their conclusions would have been based on a hypothetical scenario that mirrored the facts of the underlying case, and that plaintiffs had failed to do that.

The trial court took the matter under advisement, then granted the motion on November 3, 2006, in a written opinion and order, finding that

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[5] Sommers, Schwartz issued a check to Buddy for $22,500 as net proceeds from the arbitration.

[6] Defendants had filed an earlier motion for summary disposition, arguing that plaintiffs' claim was not timely filed and should be dismissed pursuant to MCR 2.116(C)(7). The trial court granted that motion, but this Court reversed. (Docket No. 251935, unpublished opinion of the Court of Appeals, released May 3, 2005.)

> Taking all of the allegations in the light most favorable to Plaintiffs still does not give rise to a claim for legal malpractice. All of the acts or omissions allegedly committed, even if true, by Plaintiffs' prior counsel constitute issues of tactical strategy and legal judgment and thus these claims are barred by the attorney judgment rule.
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> Even if Plaintiffs [sic] claims were not barred by the attorney judgment rule, Plaintiffs have failed to establish that they would have or could have received a larger award or jury verdict but for Defendant's alleged errors. Plaintiffs' experts' opinions do not establish that Plaintiffs would have received a larger amount beyond impermissible speculation and conjecture.
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> Plaintiffs filed this appeal.

On appeal, plaintiffs argue that the trial court erred in concluding that the acts or omissions allegedly committed by Plaintiffs' counsel in the underlying action were issues of tactical strategy and legal judgment and therefore protected by the attorney judgment rule. Specifically, plaintiffs argue that failure to present any evidence on an essential element of a plaintiff's claim constitutes malpractice, where the attorney was aware of available evidence and could have presented it. Plaintiffs also argue that the trial court erred in dismissing their claim on the ground that plaintiffs had failed to establish that they would have or could have received a larger award but for the alleged malpractice.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Spiek v Dept of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(8) relies only on the pleadings, taking all factual allegations as true, and testing the legal sufficiency of the claim; summary disposition is proper where no factual development could support relief under the claim. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim, relying on pleadings, affidavits, depositions, and other documentary evidence; summary disposition is proper only where no genuine issue of material fact exists. *Id.* at 120.

To state a claim for legal malpractice, "the plaintiff has the burden of adequately alleging the following elements:

> (1) the existence of an attorney-client relationship;
> (2) negligence in the legal representation of the plaintiff;
> (3) that the negligence was a proximate cause of an injury; and
> (4) the fact and extent of the injury alleged. [*Simko v Blake*, 448 Mich 648, 655; 532 NW2d 842 (1995).]

Clearly, an attorney-client relationship existed here. The duty implied by that relationship is limited, however, by reasonable boundaries of professionalism:

> An attorney has the duty to fashion such a strategy so that it is consistent with prevailing Michigan law. However, an attorney does not have a duty to insure or guarantee the most favorable outcome possible. An attorney is never bound to

> exercise extraordinary diligence, or act beyond the knowledge, skill, and ability ordinarily possessed by members of the legal profession. [*Simko, supra* at 657.]

Essentially, an attorney must act as an attorney of ordinary learning, judgment, or skill would under the same or similar circumstances. *Id.* at 656. Assuming an attorney acts in good faith and exercises reasonable care on behalf of the client, the potential for a malpractice claim is not measured by the success or failure of the outcome obtained by an attorney, nor by the hindsight judgment of another attorney that a different strategy or different tactics might have been better:

> Where an attorney acts in good faith and in honest belief that his acts and omissions are well founded in law and are in the best interest of his client, he is not answerable for mere errors in judgment. *Id.* at 658.

The attorney judgment rule both describes an attorney's duty to a client and sets the threshold for proving negligence as a necessary step to a legal malpractice claim. We agree with the trial court that plaintiffs failed to meet that threshold.

Plaintiffs assert that defendants failed to present any evidence on an essential element of their claim, that they had a continuing right to commissions after Buddy was terminated from the MTA account. Plaintiffs argue that defendants could have presented witnesses to support the theory that Buddy had a continuing right to commissions pursuant to standard industry practices, or to support the theory that Sondra retained a continuing right to commissions.[7] Plaintiffs argue that the failure to present any witnesses or evidence to support these theories constitutes a "gross error," which is not protected by the attorney judgment rule.

Plaintiffs rely on *Basic Food Industries, Inc v Grant*, 107 Mich App 685; 310 NW2d 26 (1981) for the proposition that failure to call a witness is grounds for malpractice, rather than a mere error in judgment. However, in that case, in addition to commenting on the failure to produce a witness to support part of plaintiff's claim, this Court noted that:

> evidence presented at trial by plaintiff showed that the defendant breached his duty of care by failing to make any pretrial discovery, failing to file a counterclaim timely as had been requested by his client, and by failing adequately

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[7] In addition, plaintiffs make vague statements about defendants' failure to call witnesses who could support the allegations of fraud against Maxey. However, plaintiffs also state in their brief that "a critical issue in the underlying action was not whether the Schubiners had procured the MTA account . . .." The allegations of fraud against Maxey relate to Maxey's designation of himself, rather than Buddy, as MTA's registered representative. We note first that since the arbitration panel awarded damages to Buddy, it seems clear that they accepted as true the allegations of misconduct by Maxey. And we further note that the client in this matter, MTA, specifically designated Maxey, not Buddy, as their representative. On August 15, 1996, Steinhelper sent a letter to Maxey: "acknowledging our arrangement to be with Consolidated Financial Corporation and also acknowledging CFC's appointment of Tom Maxey as our registered principle [sic] and registered representative acting on behalf of the MTA."

> to inform his client of its drastically increased exposure to liability. *Id.* at 690-691.

The judgment, or apparent lack thereof, of the attorney in *Basic Food* is in no way analogous to the facts of the instant case.

An attorney's decision to call or not call a witness is just the sort of tactical choice that falls squarely under the attorney judgment rule: "it is a tactical decision whether to call particular witnesses, as long as the attorney acts with full knowledge of the law and in good faith." *Simko, supra* at 660.

Plaintiffs allege that defendant Kochanowski is not protected by this rule because he failed to call a witness retained specifically for the litigation and arbitration, and failed to even interview additional potential witnesses suggested by plaintiffs. However, as the trial court correctly concluded, plaintiffs offer no actual evidence to support their allegations.

Plaintiff asserts Cucinella should have been called during the arbitration; defendant argues that Cucinella stated in his deposition that he could not remember to what he might or might not have testified. Plaintiffs have offered nothing to rebut that argument, except the vague statement from Cucinella that he believed he would not have accepted the retainer fee unless he believed at the time that he could be helpful to the case. Plaintiffs also argue that Kochanowski failed to even contact other potential witnesses, but again they fail to provide any evidence to support this allegation. Kochanowski repeatedly rebutted the allegation in his deposition. Asked whether he had contacted Mike Brooks, Kochanowski said he did contact Brooks, and determined Brooks could not offer any useful testimony in the arbitration. Kochanowski explained that he rejected another potential witness, Jeffrey Furest, because he was employed by Jefferson/Chubb. Plaintiffs assert that Furest was not employed by Jefferson/Chubb, but have failed to provide any evidence to support this claim. Another potential witness, a District Manager from another company, was rejected by Kochanowski for credibility reasons: "I didn't think he had anything to offer in terms of any substantive position that either helped or hurt our case. So, [sic] and the fact that Buddy was working for him probably indicated, would have indicated some sort of lack of credibility, in any event."

Overall, defendants have supported their argument that their use or non-use of witnesses was a matter of strategy and tactical decisions, while plaintiffs have failed to support their argument that it was a gross error in judgment. Kochanowski testified that he did pursue the theory that Buddy had a continuing right to commissions after he was terminated from the MTA account, and the failure to call any witnesses to support that theory was a tactical decision:

> we did talk to some experts in connection with a, [sic] the notion that under industry standards and practices Buddy would be required, would be entitled to a stream of income, commission income after he was fired by the client, and I recall no one agreeing with that theory . . .. There wasn't an expert that I could find that would credibly testify to that, so we decided to deflect the issue as best we could.

We find that defendants' decisions with respect to the potential witnesses are protected by the attorney judgment rule.

Plaintiffs also argue that defendants' failure to present evidence supporting Sondra's continuing right to commissions, since she was not terminated from the account, was a gross error not protected by the attorney judgment rule. Again, plaintiffs have failed to produce any evidence to support their argument that Kochanowski was aware of witnesses who would have supported this claim in the arbitration hearing. Plaintiffs appear to rely solely on Buddy's affidavit statement that in addition to Cucinella, defendants were aware of "other witnesses" who would have testified to Sondra's continuing right to commissions. In his affidavit, Buddy states that Brooks expressed the opinion that Sondra had a continuing right to commissions even after Buddy was terminated, and that Furest told him that he would "be happy" to testify on Buddy and Sondra's behalf. However, Buddy's hearsay statements about what witnesses might have said if called are simply not sufficient to support plaintiffs' claim.[8] We agree with the trial court that plaintiffs are asking us to guess what these witnesses might have said, and we join with the trial court in declining to do so.

The arbitration panel heard testimony from Sondra as to her involvement in the MTA account, and the panel dismissed Sondra's claims "in their entirety with prejudice." The witnesses plaintiffs suggest defendants should have called are witnesses Kochanowski avers he chose not to call for specific tactical reasons. Plaintiffs ask us to second-guess those decisions with the benefit of hindsight. The attorney judgment rule precludes us from doing so.

Plaintiffs also argue that the trial court erred in dismissing plaintiffs' claim for failure to prove proximate causation and damages. Plaintiffs suggest that whether a better result would have been obtained absent the malpractice is a question of fact and cannot be resolved by summary disposition.

Although proximate cause is generally a question of fact, if reasonable minds could not differ on the issue, the court should decide the issue as a matter of law. *Farmer v Christensen*, 229 Mich App 417, 424; 581 NW2d 807 (1998). "In order to establish proximate cause, a plaintiff must show that a defendant's action was a cause in fact of the claimed injury. Hence, a plaintiff must show that but for an attorney's alleged malpractice, the plaintiff would have been successful in the underlying suit. This is the 'suit within a suit' requirement in legal malpractice cases." *Manzo v Petrella*, 261 Mich App 705, 712; 683 NW2d 699 (2004) (citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-587; 513 NW2d 773 (1994).

We note first that plaintiffs won an arbitration award. Their complaint on appeal is not that they lost the arbitration, but that the damages award should have been larger. Because plaintiffs were successful in the underlying action, to succeed on their malpractice claim they must show that but for defendants' alleged malpractice, they would have received a larger award.

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[8] See MCR 2.119(B)(1): If an affidavit is filed in support of or in opposition to a motion, it must:

(b) state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion; and

(c) show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit.

Plaintiffs' counsel asked Kochanowski in his deposition to speculate about the potential for a higher damages award:

> Plaintiffs' Counsel: Do you agree that it would have been certainly favorable to the Schubiners' case if you could have found a liability expert to support their theories?
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> Kochanowski: If I could have found someone that said even if your client fires you, you have to keep, the, the broker/dealer has to keep paying commissions and that's what's done in the industry, sure, I'd love to have found a person like that, because that would have maybe changed our whole approach. But since we were not aware of any such person, nor do I think that such a person exists who could credibly testify to something that is plainly false, as all three of these arbitrators knew was plainly false, it's a moot point.

Plaintiffs essentially asked the trial court to speculate about the same issue; in their brief on appeal, Plaintiffs argue "the Circuit Court should have examined the evidence Defendants negligently failed to present in the underlying action and asked whether a reasonable jury could have arrived at a more significant award after considering that evidence." Again, however, plaintiffs have failed to actually produce any evidence. Plaintiffs rely on Buddy's hearsay statements as to what certain witnesses might have said if called. This is simply insufficient to support any conclusion beyond mere speculation. And a causation theory premised on mere conjecture is insufficient:

> at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. [*Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994)]

Plaintiffs have offered no evidence to support the claim that defendants committed gross errors in judgment, or that but for any alleged errors, plaintiffs would have received a larger arbitration award. The trial court did not err in granting summary disposition to defendants.

Affirmed.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff